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County of Los Angeles and Lee Baca

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANGELA LOCKHART, GAIL SCORZA, and PATRICK GOMEZ, on behalf of themselves and all other similarly situated,

Plaintiff,

v.

COUNTY OF LOS ANGELES, LEE BACA, individually and in his official capacity as SHERIFF OF LOS ANGELES COUNTY, and DOES 1 through 10, inclusive,

Defendants.

Case No. CV 07-1680 ABC (CWx)

DEFENDANTS' NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: December 20, 2010
Courtroom: 680
Time: 10:00 a.m.

TO THE COURT, PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 20, 2010, at 10:00 a.m., or as soon thereafter as counsel may be heard in Courtroom 680 of the above entitled Court, located at the Roybal Federal Building, 255 East Temple Street, Los Angeles, California 90012, Defendants COUNTY OF LOS ANGELES and LEROY BACA (collectively "the County" or "Defendants") will move the Court, pursuant to Fed. R. Civ. P. 56(b), for Partial Summary Judgment against all Plaintiffs on the following grounds:

1. Plaintiffs' donning and doffing claim is barred by the doctrine of collateral estoppel because the same claim was litigated and adjudicated in Defendants favor in a prior lawsuit between the parties and their privies before this Court in *Vallerand, et al. v. County of Los Angeles, et al., U.S.D.C. Case No. CV08-05057 DMG (VBKx)* (hereinafter, "*Vallerand*");

2. Alternatively, if the Court declines to invoke collateral estoppel, the Court may exercise its broad discretion to control its own docket and dismiss Plaintiffs' donning and doffing claim because it is duplicative of the same claim asserted and adjudicated in Defendants favor in *Vallerand*;

3. Defendants are entitled partial summary judgment on their second affirmative defense that they have a 7-day partial overtime exemption under 29 U.S.C. §207(k) for their deputy sheriffs' on the grounds that this issue was litigated and adjudicated in Defendants favor in *Vallerand* and that the doctrine of collateral estoppel bars Plaintiffs from re-litigating this issue here; and

4. Alternatively, if the Court declines to invoke collateral estoppel, the Court may exercise its broad discretion to control its own docket and enter partial summary judgment in Defendants favor on their second affirmative defense that it has a 7-day partial overtime exemption under 29 U.S.C. §207(k) for its deputy

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sheriffs' because this issue is duplicative of the same issue asserted and adjudicated in Defendants favor in *Vallerand*.

The conference of counsel pursuant to Local Rule 7-3 took place before the filing this motion on November 1, 5 and 8, 2010. (*See* Declaration of Elizabeth T. Arce filed concurrently herewith.)

This motion is based on this Notice of Motion and Motion, the concurrently filed Memorandum of Points and Authorities, the Separate Statement of Uncontroverted Facts and Conclusions of Law, the Declaration of Elizabeth T. Arce, Declaration of Gregory P. Nelson, Request for Judicial Notice and exhibits thereto, and all pleadings and papers on file in this action and upon such other matters as may be presented to the Court at the time of hearing.

Dated: November 18, 2010

LIEBERT CASSIDY WHITMORE

By: _____
Brian P. Walter
Geoffrey S. Sheldon
Jennifer K. Palagi
Elizabeth T. Arce
Attorneys for Defendants
COUNTY OF LOS ANGELES and
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

By this motion, Defendants County of Los Angeles and its elected Sheriff, Lee Baca (collectively "the County"), respectfully ask this Court to grant it partial summary judgment on Plaintiffs' donning and doffing claim, and the County's Second Affirmative Defense regarding the partial exemption from the federal overtime requirements provided for under section 207(k) of the Fair Labor Standards Act (hereinafter "7(k) exemption"). This motion is based on the grounds that the very same issues were previously litigated and adjudicated in the County's favor earlier this year in another lawsuit between the parties and their privies, *Vallerand, et al. v. County of Los Angeles, et al.,* U.S.D.C. Case No. CV08-05057 DMG (VBKx) (hereinafter "the *Vallerand* case"). Consequently, in the interests of promoting judicial economy and of relieving the parties of the burden and expense of duplicative litigation, the Plaintiffs in this case should be collateral estopped from relitigating those issues here.

Alternatively, if this Court determines that collateral estoppel may not be invoked defensively here, then the County respectfully requests that the Court exercise its broad discretion to control its docket by dismissing Plaintiffs' donning and doffing claim with prejudice and enter partial summary judgment in the County's favor on their second affirmative defense regarding the 7(k) exemption on the grounds that these issues are duplicative of the same claims adjudicated in the County's favor in *Vallerand.*

II. STATEMENT OF FACTS

A. THE *LOCKHART* LITIGATION

On March 13, 2007, Plaintiffs Angela Lockhart, Gail Scorza and Patrick Gomez commenced this lawsuit (hereinafter "*Lockhart*") against the County. (*Lockhart* Civil Docket (Dkt.) #1.) On July 25, 2001, Lockhart, Scorza and Gomez filed a Second Amended Complaint alleging that they and other similarly situated

deputy sheriffs were required by the County's Sheriff's Department ("LASD") to perform various pre-shift and post-shift activities without compensation in violation of the FLSA. (*Lockhart* Dkt. #10.) One of the principal claims at issue in the *Lockhart* case is whether deputy sheriffs are entitled to overtime compensation under the FLSA for time spent "donning" and "doffing" their Sheriff's Department ("LASD") uniforms and equipment (*i.e.,* ballistic vests and Sam Browne equipment belts.) (*Lockhart* Dkt. #10, ¶¶29, 32.)

On November 6, 2007, the County filed an Answer to the Second Amended Complaint. (*Lockhart* Dkt. #36.) The Answer set forth as a second affirmative defense that Plaintiffs are partially exempt from the overtime requirements of the FLSA because the County adopted and implemented a 7-day work period for employees involvement in law enforcement activities pursuant to 29 U.S.C. §207(k) and 29 C.F.R. §§553.201 and 553.211. (*Lockhart* Dkt. #36, pp. 15-16.)

On July 14, 2008, the Court conditionally certified this case as a collective action. (*Lockhart* Dkt. #66.) The named-plaintiffs are now joined in this lawsuit by approximately 188 opt-in plaintiffs who are current and former deputies of the LASD (the named-plaintiffs and opt-in plaintiffs shall collectively be referred to as "Plaintiffs"). (*Lockhart* Dkt. #21-24, 153-163, 165-238, 262-310, 320-367, 369-374, 377-382, 450-467, 469-475, 479-481, 485.) However, approximately 50 opt-in Plaintiffs are also plaintiffs in the related case, *Ascolese, et al. v. County of Los Angeles, et al.*, U.S.D.C. Case No. 08-01267 ABC (CWx) (hereinafter, "*Ascolese*"). (*See* the County's Statement of Uncontroverted Facts ("UF") No. 6.) For example, Plaintiffs Paul Greve and Joyce Macheca have also opted into *Ascolese*. (*Lockhart* Dkt. #186, 210; *Ascolese* Dkt. #4.)

B. THE *VALLERAND* LITIGATION

On August 1, 2008, approximately one month before the *Ascolese* case was filed, fourteen County employees (a combination of LASD deputy sheriffs, LASD security officers and police officers of the County's now defunct Office of Public

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Safety ("OPS") filed the *Vallerand* lawsuit. (*Vallerand* Civil Docket (Dkt.) #1.) Like the *Lockhart* case, the *Vallerand* case was originally styled as a FLSA collective action, *i.e.,* the named plaintiffs sought to represent the interests of "similarly situated" LASD deputy sheriffs, as well as "similarly situated" LASD security officers and OPS police officers. (*Vallerand* Dkt. #1, ¶1.) In fact, approximately 713 individuals filed consents to join the *Vallerand* case as party plaintiffs pursuant to 29 U.S.C. section 216(b). (*Vallerand* Dkt. #27-40, 48-58, 61-62, 68-69, , 71-72, 75-76, 79.) However, the *Vallerand* Court struck all of the "opt-in" Plaintiffs on October 8, 2009 on the grounds that the *Vallerand* plaintiffs failed to file their motion for conditional certification in a timely manner. (*Vallerand* Dkt. #70, 103.)

Like *Lockhart*, the *Vallerand* case alleges that the County violated the FLSA by requiring the *Vallerand*-plaintiffs to perform various pre-shift and post-shift activities without compensation. (*Vallerand* Dkt. #18.) As is the case in this action, one of the primary claims at issue in *Vallerand* was the plaintiffs' claim that they are entitled to overtime compensation under the FLSA for time spent donning and doffing their LASD uniforms and equipment. (*Vallerand* Dkt. #18, ¶¶15-20, 22 and UF No. 1.)

On October 13, 2008 and November 14, 2008, the County filed Answers to the First Amended Complaint. (*Vallerand* Dkt. #43, 63.) As with the Answer filed in *Ascolese,* the Answers set forth as a second affirmative defense that the *Vallerand* plaintiffs are partially exempt from the FLSA's overtime requirements because the County adopted and implemented a 7-day work period for law employees involvement in law enforcement activities pursuant to 29 U.S.C. §207(k) and 29 C.F.R. §§553.201 and 553.211. (*Vallerand* Dkt. #43, p. 9, and #63, p. 9.)

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1. Partial Summary Judgment Was Granted in Favor of the County on the Donning and Doffing Claim

On September 28, 2009, the parties filed cross-motions for summary judgment on the *Vallerand* plaintiffs' donning and doffing claims.[1] (*Vallerand* Dkt. #90-95.) Extensive opposition and reply papers were filed by the parties in connection with these motions on October 5, 2009 and October 9, 2009, respectively. (*Vallerand* Dkt. #97-102, 104-107.)

On March 25, 2010, the United States Court of Appeals, Ninth Circuit issued its long-awaited opinion in *Bamonte v. City of Mesa*, 598 F.3d 1217 (9th Cir. 2010). This opinion held that the time City of Mesa police officers spent before and after their paid shifts donning and doffing their uniforms and related protective gear is ***not*** compensable work under the FLSA because the officers had the option and ability to don and doff their uniform and gear off of the employer's premises. (*Id.* at 1231 ("Although logical reasons exist for the police officers not to avail themselves of the at-home option, such as comfort, safety concerns, and exposure of family members to certain substances, these reasons reflect preferences rather than mandates. In sum, donning and doffing of uniforms and related gear are not required by law, rule, the employer or the nature of the police officers' work to be performed at the employer's premises.") The *Bamonte* opinion is significant because it settled a split among district courts within the Ninth Circuit as to the applicable legal standard for determining the compensability of police officer donning and doffing activities.

The district court granted the parties an opportunity to file further supplemental briefs in light of *Bamonte*. (*Vallerand* Dkt. #148-150.) The *Vallerand* plaintiffs' also filed additional evidence with their brief, including a declaration by Cronin that directly addressed the donning and doffing claims.

[1] The County also moved for summary judgment on the *Vallerand*-plaintiffs' off-the-clock claims. (*Vallerand* Dkt. #90.)

(*Vallerand* Dkt. #150.) The district court issued a tentative ruling in favor of the County on the donning and doffing claims and gave the parties an opportunity to respond to the tentative during oral argument on July 16, 2010. (*Vallerand* Dkt. #154.) Thereafter, the district court took the motions under submission. (*Vallerand* Dkt. #154.) On August 6, 2010, the district court issued a final 29-page order granting the County partial summary judgment on the *Vallerand* plaintiffs' donning and doffing claims in their entirety (hereinafter, "*Vallerand* Order" or "Order"). (*See Vallerand* Dkt. #155 attached as Exhibit "1" to the County's Request for Judicial Notice ("RJN") and UF No. 2.)

2. The County Successfully Established that it Has a 7-Day, 7(k) Exemption for Deputies During Phase I of Trial

On October 7, 2010, the *Vallerand* Court granted the parties request to trifurcate trial. (*Vallerand* Dkt. #160-161.) Phase I was a bench trial that specifically addressed the issue of whether or not the County has a 7-day, 7(k) exemption for its deputy sheriffs. (*Vallerand* Dkt. #160-161.) As part of Phase I of trial, the parties submitted exhaustive trial briefs on the 7(k) issue with supporting evidence. (*Vallerand* Dkt. #163-164, 166-170.) On November 8, 2010, the Court issued an Order deeming the 7(k) issue appropriate for determination on the parties' briefs and vacated the Phase I trial date. (*Vallerand* Dkt. #172.) In addition, the Court found that in light of the uncontroverted evidence submitted by the parties, the County met their burden of establishing a regularly recurring 7-day, 7(k) work period for its law enforcement employees, including the deputy sheriffs employed in LASD. (*See Vallerand* Dkt. #172 attached as Exhibit "2" to the RJN and UF No. 11.)

III. APPLICABLE LEGAL STANDARD REGARDING PARTIAL SUMMARY JUDGMEMT

The party moving for summary judgment/partial summary judgment has the initial burden of establishing there is "no genuine issue as to any material fact and

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that [it] is entitled to a judgment as a matter of law." (Fed. R. Civ. Pro. 56(c).) When the party opposing the motion for summary judgment or adjudication has the burden of proof at trial, the moving party has no burden to negate its opponent's claim. (*Celotex Corp. v. Catrett*, 477 U.S. 317, 323-325, 106 S. Ct. 2548 (1986).) The moving party has no burden to produce any evidence showing the absence of a genuine issue of material fact. (*Id.* at 325.) "Instead, . . . the burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." (*Id.*; *see also Fairbank v. Johnson*, 212 F.3d 528, 532 (9th Cir. 2000) ("[A] moving defendant may shift the burden of producing evidence to the nonmoving plaintiff merely by "showing" – that is, pointing out through argument – the absence of evidence to support plaintiff's claim.").) A party moving for summary judgment may also carry its initial burden by producing evidence that negates an element of its opposing party's claim. (*Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F. 3d 1099 (9th Cir. 2000).)

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IV. THE COUNTY IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' DONNING AND DOFFING CLAIMS UNDER THE COLLATERAL ESTOPPEL DOCTRINE

A. LEGAL STANDARD REGARDING THE APPLICATION OF DEFENSIVE COLLATERAL ESTOPPEL

Collateral estoppel will preclude relitigation of issues actually litigated and decided in a prior action. (*Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5, 99 S.Ct. 645 (1979).) The dual purpose of collateral estoppel is to protect litigants from the burden of relitigating an identical issue with the same party or his privity and to promote judicial economy by preventing needless litigation. (*Id.* at 326.)

Collateral estoppel may be invoked offensively or defensively. Defensive use of collateral estoppel occurs when a defendant, as in this case, seeks to prevent a plaintiff from relitigating an issue the plaintiff or his privity has previously litigated unsuccessfully in another action against the same or a different party.

(*U.S. v. Mendoza*, 464 U.S. 154, 159, n. 4, 104 S.Ct. 568 (1984).) Courts generally favor defensive use of collateral estoppel because it promotes judicial economy. (*Parklane*, 439 U.S. at 650-651; *Acevedo-Garcia v. Monroig*, 351 F.3d 547, 574 (1st Cir. 2003).) A federal court decision can be used for defensive collateral estoppel when the following factors are met:

> (1) An identical issue was necessarily decided as part of the prior proceeding;
>
> (2) The prior proceeding concluded with a final judgment on the merits; and
>
> (3) The party to be collaterally estopped is the same as or in privity with the party in the prior proceeding.
>
> (*Hydranautics v. Filmtec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000); *RE/MAX Intern., Inc. v. Equity Max Reality, Inc.*, 2007 WL 1110590 at *2 (S.D. Cal. 2007).)

As discussed below, all three factors for defensive use of collateral estoppel with respect to the *Vallerand* Order regarding donning and doffing are satisfied and Plaintiffs should be barred from relitigating that claim here.

B. THE DONNING AND DOFFING ISSUES IN *LOCKHART* AND *VALLERAND* ARE IDENTICAL AND THEY WERE NECESSARILY DECIDED IN *VALLERAND*

The Ninth Circuit has identified the following four factors to evaluate whether issues are identical:

> (1) Whether there is substantial overlap in the evidence or argument presented in the first proceeding and that to be advanced in the second proceeding;
>
> (2) Whether the same rule of law applies;
>
> (3) Whether pretrial preparation and discovery for the first matter would have covered the information to be presented in the second matter; and

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(4) The relatedness of the claims. (*RE/MAX., supra,* 2007 WL 1110590 at *2.)

The relevant inquiry in evaluating the third factor is whether the pretrial preparation and discovery relating to the donning and doffing claim in *Vallerand* reasonably be expected to have embraced the donning and doffing issues to be presented in *Lockhart*. (*Resolution Trust Corp. v. Keating*, 186 F.3d 1110, 1116 (9th Cir. 1999).) As for the fourth factor, the relevant inquiry is how closely related are the donning and doffing claims involved in *Vallerand* and *Lockhart*. (*Id.*) As discussed below, an examination of these factors show that the donning and doffing issues raised in *Vallerand* and *Lockhart* are identical.

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1. The Second Factor is Satisfied Because The Same Rule of Law Applied in *Vallerand* Regarding the Donning and Doffing Claim Will Also Apply to *Lockhart*

Before the *Bamonte* decision was handed down earlier this year, district courts within the Ninth Circuit were split over the applicable legal standard for evaluating whether or not the donning and doffing activities of police officers are compensable.[2] *Bamonte* settled this split and sets forth the controlling law in the Ninth Circuit regarding the compensability of police officer donning and doffing activities. In addition, *Bamonte* is the only decision by an appellate court on this issue.[3] Consequently, *Bamonte* will also control the outcome of this case as it did in *Vallerand*.[4]

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[2] *See, e.g., Bamonte v. City of Mesa*, 2008 WL 1746168 (D. Ariz. 2008); *Abbe v. City of San Diego*, 2007 WL 4146696 (S.D. Cal. 2007); *Dager v. City of Phoenix*, 2009 WL 531864 (D. Ariz. 2009); *Martin v. City of Richmond*, 504 F.Supp.2d 766 (N.D. Cal. 2007); *Lemmon v. City of San Leandro*, 538 F.Supp.2d 1200 (N.D. Cal. 2007).

[3] The donning and doffing cases decided by other appellate courts stem from other industries. (*See, e.g., De Asencio v. Tyson Foods, Inc.*, 500 F.3d 361 (3rd Cir. 2007) (meat processing plant); *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586 (2nd Cir. 2007) (nuclear power plant); *Musch v. Domtar Industries, Inc.*, 587 F.3d 857 (7th Cir. 2009) (paper mill).

[4] In addition to the *Vallerand* Court, other district courts within the Ninth Circuit have applied *Bamonte* in evaluating the compensability of donning and doffing activities of law enforcement employees. (*See, e.g., Margaret Reed, et al. v.*

2. The First, Third and Fourth Factors Are Satisfied Because the Donning and Doffing Claims in *Vallerand* and *Lockhart* Are Related, Share the Same Evidence and Argument, and Share the Same Discovery

a. The *Vallerand* Ruling

In confronting the donning and doffing issues in *Vallerand*, the County presented the following evidence:

(1) Section 3-03/030.10 of the LASD's Manual of Policies and Procedures ("MPP") permits deputies to wear their uniforms while commuting, provided that all identifying uniform and equipment is covered (*Vallerand* Dkt. #155 attached as Exhibit "1" to the RJN at p. 4:12-14);

(2) The County does not have a policy requiring Plaintiffs to don and doff their uniforms and equipment on County premises (*Vallerand* Dkt. #155 attached as Exhibit "1" to the RJN at p. 4:10-12);

(3) The *Vallerand*-plaintiffs are free to dress at home (*Vallerand* Dkt. #155 attached as Exhibit "1" to the RJN at p. 4:18);

(4) County locker rooms are provided for the convenience of employees who prefer to don and doff at work (*Vallerand* Dkt. #155 attached as Exhibit "1" to the RJN at p. 4:18-22);

(5) Not all assignment locations have locker rooms

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County of Orange, 2010 WL 2342394 (C.D. Cal. 2010); *James Nolan, et al. v. City of Los Angeles, et al.*, U.S. District Court, Case No. 04-08592 (C.D. Cal. 2010), Dkt. #2817; *Los Angeles Police Protective League, et al. v. City of Los Angeles, et al.*, U.S. District Court, Case No. 06-06390 (C.D. Cal. 2010), Dkt. #18,249 and 18, 305.)

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(*Vallerand* Dkt. #155 attached as Exhibit "1" to the RJN at p. 4:22);

(6) Some deputies don and doff at work and others don and doff, either fully or partially, at home (*Vallerand* Dkt. #155 attached as Exhibit "1" to the RJN at p. 4:22-27);

(7) Motorcycle deputies regularly don and doffing their uniforms and gear at home and commute in uniform (*Vallerand* Dkt. #155 attached as Exhibit "1" to the RJN at p. 4:25-27).

The *Vallerand* plaintiffs could not dispute the fact that the County's uniform policy (*e.g.,* Section 3-03/030.10 of the LASD MPP) is identical to the employer's policy in *Bamonte, i.e.*, it gives deputies the discretion to wear their uniforms and gear while commuting provided that identifying parts of the uniform and equipment are covered. (*Vallerand* Dkt. #155 attached as Exhibit "1" to the RJN at p. 4:10-12.) Instead, the *Vallerand* plaintiffs tried to work around *Bamonte* by arguing that the nature of their work as deputies left them with "no true, viable option" to don and doff at home, and thus the County has a "*de facto*" requirement that mandates donning and doffing at work. The *Vallerand* plaintiffs presented the following evidence in support of this argument:

(1) Donning, doffing, cleaning and maintenance of uniform and equipment must be performed by the *Vallerand*-plaintiffs either before or at the end of their paid work shifts (*Vallerand* Dkt. #155 attached as Exhibit "1" to the RJN at p. 5:1-10);

(2) The *Vallerand* plaintiffs are expected to be "patrol ready" by the time briefing begins and no donning is allowed after the start of briefing because patrol deputies must be ready to respond to calls the moment briefing

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ends (*Vallerand* Dkt. #155 attached as Exhibit "1" to the RJN at p. 5:10-14);

(3) Failure to be on time to briefing can result in both informal reprimands and formal discipline (*Vallerand* Dkt. #155 attached as Exhibit "1" to the RJN at p. 5:14-15);

(4) It is not feasible or possible to entirely cover the uniform when commuting in uniform (*Vallerand* Dkt. #155 attached as Exhibit "1" to the RJN at p. 5:16-18);

(5) It is unsafe to commute in uniform because it allows deputies and their families to be targeted and followed home by gang members, criminals and citizens who do not like the police (*Vallerand* Dkt. #155 attached as Exhibit "1" to the RJN at p. 5:18-25);

(6) Donning and doffing at home poses risks to family members as a result of deputies bringing home toxic materials on uniform and boots or having weapons in their homes (*Vallerand* Dkt. #155 attached as Exhibit "1" to the RJN at p. 5:26-28);

(7) Commuting in uniform puts deputies at risk because they may be asked for assistance without a radio and access to backup (*Vallerand* Dkt. #155 attached as Exhibit "1" to the RJN at pp. 5:28-6:7);

(8) Some of the tools and protective gear cannot be taken home and can only be checked out at work (*Vallerand* Dkt. #155 attached as Exhibit "1" to the RJN at p. 6:7-9);

(9) Deputies have been instructed by their superiors, and instruct their subordinates to don and doff at work

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because of safety risks (*Vallerand* Dkt. #155 attached as Exhibit "1" to the RJN at p. 6:10-12);

(10) It is LASD "tradition" to arrive to work 20-30 minutes before their shift to relieve the outgoing shift (*Vallerand* Dkt. #155 attached as Exhibit "1" to the RJN at p. 6:12-16);

(11) The majority of deputies don and doff at work (*Vallerand* Dkt. #155 attached as Exhibit "1" to the RJN at p. 6:17-22);

(12) It is estimated that 90% of deputies, sergeants and lieutenants don and doff at work (*Vallerand* Dkt. #155 attached as Exhibit "1" to the RJN at p. 6:22-24).

In support of their argument, the *Vallerand* plaintiffs' evidence consisted of their own deposition testimony and declarations setting forth the reasons they choose to don and doff at work. However, the *Vallerand* Court rejected all of the *Vallerand* plaintiffs' arguments because they were "virtually identical" to the "nature of the work" reasons offered by the City of Mesa police officers in *Bamonte* that the Ninth Circuit ultimately rejected as "preferences" instead of "mandates." (*Vallerand* Dkt. #155 attached as Exhibit "1" to the RJN at pp. 14:4-15:16.) In addition, the Court rejected the *Vallerand* plaintiffs' argument that the County has a "*de facto*" policy requiring on-premises donning and doffing simply because most deputies choose to don and doff at work. (*Vallerand* Dkt. #155 attached as Exhibit "1" to the RJN at p. 15:16-23.) Finally, the fact that some of the *Vallerand* plaintiffs actually donned and doffed at home and were not disciplined for it demonstrated to the Court that no *de facto* requirement existed. (*Vallerand* Dkt. #155 attached as Exhibit "1" to the RJN at pp. 15:24-16:9.)

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b. The *Lockhart* Court Will Be Evaluating the Same MPP Section 3-03/030.10 as in *Vallerand*

The *Lockhart* plaintiffs are all LASD deputy sheriffs who are subject to the same uniform policy (*i.e.,* LASD MPP Section 3-03/030.10) that was at issue in *Vallerand.* (UF No. 4, 9.) Since they cannot refute the fact that LASD Manual Section 3-03/030.10 gives deputy sheriffs discretion to dress at home and commute to work in uniform and that some deputies, in fact, don and doff at home, the *Lockhart* plaintiffs will likely pursue the same legally irrelevant arguments that were raised and rejected in *Vallerand*, *i.e.,* that the purported health and safety reasons for not commuting in uniform have given rise to a "*de facto*" policy requiring deputies don and doff at work.[5] Since the Plaintiffs are subject to the same County uniform policy that was at issue in *Vallerand,* and since their attempts to work around *Bamonte* have already been rejected by the *Vallerand* Court, this Court will be forced to utilize its limited judicial resources towards, essentially, duplicating the *Vallerand* Court's efforts in evaluating Plaintiffs' donning and doffing claim. Such an outcome not only runs counter to judicial efficiency, but it also burdens the parties with repetitive litigation.

C. THE *VALLERAND* COURT'S ORDER REGARDING DONNING AND DOFFING IS A FINAL JUDGMENT FOR PURPOSES OF COLLATERAL ESTOPPEL

A "final judgment" for purposes of collateral estoppel can be any prior adjudication of an issue in another action that is determined to be "sufficiently firm" to be accorded conclusive effect. (*Luben Industries, Inc. v. U.S.*, 707 F.2d 1037, 1040 (9th Cir. 1983).) A decision need not possess finality in the sense of 28 U.S.C. §1291. (*Id.*) Rather, finality in the context of collateral estoppel means little more than that ***the litigation of a particular issue has reached such a stage that the court sees no really good reason for permitting it to be litigated again.***

[5] Presumably, Plaintiffs hope that they can get a different (*i.e.,* inconsistent) result with these arguments a second time around.

(*Syverson v. International Business Machines Corp.*, 472 F.3d 1072, 1079 (9th Cir. 2007 *citing to Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2nd Cir. 1961) (emphasis added); *Curtiss-Wright Flow Control Corp. v. Z & J Technologies GmbH*, 563 F.Supp.2d 1109, 1122 (C.D. Cal. 2007).) Thus, "the proper query here is whether the court's decision *on the issue as to which preclusion is sought* is final." (*Syverson,* 472 F.3d at 1079 (emphasis in the original).) The basic test is whether the earlier decision was "procedurally definite," and not whether the court might have had doubts in reaching the decision. (*Matter of Lockhard*, 884 F.2d 1171, 1175 (9th Cir. 1989).)

The Ninth Circuit has articulated a number of factors that should be considered in determining whether a prior adjudication is "sufficiently firm" to be accorded conclusive effect. These considerations include (1) whether the decision was not avowedly tentative; (2) whether the parties were fully heard; (3) whether the court supported its decision with a reasoned opinion; and (4) whether the decision was subject to an appeal. (*Security People, Inc. v. Medeco Security Locks, Inc.*, 59 F.Supp.2d 1040, 1045 (N.D. Cal. 1999) *citing to Luben,* 707 F.2d at 1040.) In considering these factors, it is clear that the *Vallerand* Order is sufficiently firm to be considered a final judgment for purposes of collateral estoppel.

Here, it is clear that the *Vallerand* Order is not tentative in nature, and the record demonstrates that both the *Vallerand* plaintiffs and the County were given ample opportunity to be fully heard on the issues pertaining to the donning and doffing claims. The parties were given two opportunities to brief and submit evidence on the issues, before and after the Ninth Circuit issued its ruling in *Bamonte*. (*Vallerand* Dkt. #90-95, 97-102, 104-107, 148-150.) In addition, the *Vallerand* Court allowed the parties to engage in oral argument on the donning and doffing issues. (*Vallerand* Dkt. #154.) After giving the parties extensive opportunities to be heard on the very same arguments that the *Lockhart* plaintiffs

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will likely advance here, the *Vallerand* Court articulated its ruling in a reasoned 29-page Order. (*Vallerand* Dkt. #155.)

Finally, the *Vallerand* Order may be treated as final for purposes of collateral estoppel because appellate review was available, but not sought, by the *Vallerand* plaintiffs. (*See Rambus, Inc. v. Hynix Semiconductor Inc.*, 569 F.Supp.2d 946, 968 (N.D. Cal. 2008) (holding that the rule regarding the inability to obtain appellate review bars the application of issue preclusion does not apply in cases where review is available but is not sought).) The *Vallerand* plaintiffs could have moved for reconsideration of the Order but they did not. In addition, they could have taken an immediate appeal of the Order by either seeking permission from the *Vallerand* Court certify it for an interlocutory appeal (28 U.S.C. §1292(b)) or by asking the Court to enter a final judgment with respect to the donning and doffing ruling only so that they could take an immediate appeal (Fed. R. Civ. P. 54(b)). Since the *Vallerand* plaintiffs affirmatively chose not to pursue their appellate rights even though available, the *Vallerand* Order regarding the donning and doffing claim is final for purposes of collateral estoppel.

D. PRIVITY EXISTS BETWEEN THE *LOCKHART* AND *VALLERAND* PLAINTIFFS

In order for collateral estoppel to apply, there must also be identity or privity between the parties to the relevant litigation. (*In re Gottheiner*, 703 F.2d 1136, 1139 (9th Cir. 1983).) "The person being estopped from relitigating an issue must have been either a party to the prior lawsuit or have been so ***closely related*** to the interest of the party to be fairly considered to have had his day in court." (*Id.* (emphasis added).) The concept of privity has been "substantially expanded in recent years as courts increasingly give weight to considerations of judicial economy and finality of judgments in binding parties to prior judicial determinations. 'Courts are no longer bound by rigid definitions of parties or their privies for purposes of applying collateral estoppel or res judicata.'" (*MCA*

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Records, Inc. v. Charly Records, LTD, 865 F.Supp. 649, 654 (C.D. Cal. 1994) *quoting U.S. v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980).)

The privity requirement is clearly satisfied in the instant case. Like the Plaintiffs here, the *Vallerand* plaintiffs included LASD deputy sheriffs (*i.e.*, Cronin and Bruce Vallerand) as party plaintiffs.[6] (UF No. 7.) As such, they wore the same LASD uniforms and equipment that the Plaintiffs in this action wear.[7] (UF No. 8.) Most importantly, all LASD deputy sheriffs' are subject to the same County policy (*i.e.*, LASD MPP Section 3-03/030.10) that was critical to the *Vallerand* Court's determination that LASD deputy sheriffs' donning and doffing activities are not compensable under the FLSA. (*Vallerand* Dkt. #155 attached as Exhibit "1" to the RJN at p. p. 412-17; UF No. 4, 9.)

Under similar circumstances, courts have found the interests of employees so closely aligned as to find them in privity with one another. In *Mauro v. Federal Express*, 2009 WL 1905036 * 3 (C.D. Cal. 2009), for example, the Court found that privity existed between "couriers" in the first case and "swing drivers" in a second, later-filed case because both classes of drivers worked for the same company and they picked up and delivered packages to and from residential and business locations as part of their employer's business. (*Id.*) Similarly, in *Los Angeles Police Protective League v. City of Los Angeles*, 94 Cal.App.4th 77 (2001) ("*LAPPL I*"), the Court determined that two employees subject to the same memorandum of understanding and manual of policies and procedures satisfied the privity

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[6] In addition, at least two other *Vallerand* Plaintiffs are now deputy sheriffs in the LASD. (UF No. 10.) While *Vallerand* Plaintiffs Alex Farfan and Leon Reynolds were Sergeants in what was formerly OPS, they are now employed as LASD deputy sheriffs in light of the abolition of OPS. (*Id.*) As the *Vallerand* Court concluded, OPS and LASD had the exact same policy regarding commuting in uniform. (*Vallerand* Dkt. #155 attached as Exhibit "1" to the RJN at p. 412-17.)

[7] There is also identity between the parties in *Lockhart* and *Ascolese* as there are approximately 50 individuals who have opted into both cases. (UF No. 16.) Thus, in the event the Court grants the County's concurrently filed motion for partial summary judgment in *Ascolese*, collateral estoppel should be invoked to apply that ruling to *Lockhart*.

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requirement for use of collateral estoppel. In *LAPPL I*, the union for a police sergeant (Robert Smith) filed a motion to compel arbitration of his employing department's decision to transfer him to a different assignment with the reduced pay applicable to that assignment. The key issue to be decided was whether Sergeant Smith's claims were subject to arbitration under certain provisions of the MOU. The Court of Appeal gave collateral estoppel effect to the holding in an unpublished appellate opinion involving ***another*** City police officer, Fernando Lopez, which interpreted the ***same*** MOU provisions at issue in Smith's case. (*Id.* at 84.)

In a second case brought by the Los Angeles Police Protective League against the City of Los Angeles ("*LAPPL II*"), the Court also determined that two employees subject to the same manual of policies and procedures satisfied the privity requirement for use of collateral estoppel. In *LAPPL II*, the union representing the City's police officers brought an action against the City and its police chief challenging the validity of an order establishing the procedures for administrative challenges by officers who were reassigned to lower pay grades or who were deselected from bonus positions. (*Los Angeles Police Protective League v. City of Los Angeles*, 102 Cal.App.4th 85, 88-89 (2003). One of the issues to be decided is whether the City's police officers hold a property interest in their pay grades. (*Id.* at 89.) This precise issue was presented and decided in an unpublished decision entitled *Cooper v. City of Los Angeles*. The Court gave collateral estoppel effect to the holding in *Cooper* that officers hold a property interest in their pay grades. (*Id.* at 91.)

Based on the applicable authorities and the indisputable facts, it is clear that the privity requirement is satisfied in this case. As such, the Court should grant partial summary judgment on the Plaintiffs' donning and doffing claim in favor of the County.

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E. THE EQUITIES OF THIS CASE WEIGH IN FAVOR OF DISMISSAL OF PLAINTIFFS' DONNING AND DOFFING CLAIM

In the event the Court concludes that the County has not satisfied the requirements of collateral estoppel, the Court may still dismiss Plaintiffs' donning and doffing claim. Plaintiffs have not right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant. (*Adams v. Cal. Dept. of Health Servs.*, 487 F.3d 684, 688 (9th Cir. 2007). Consequently, district courts retain broad powers to prevent duplicative or unnecessary litigation. (*Ricchio v. Hornbeak*, 2010 WL 1838317 at *4 (C.D. Cal. 2010) *citing to Slack v. McDaniel*, 529 U.S. 473, 478, 120 S.Ct. 1595 (2000).) After weighing the equities of a case, the district court may exercise its discretion to dismiss a duplicative, later-filed action. (*Mauro v. Federal Express Corp.*, 2009 WL 1905036 at *4 (C.D. Cal. 2009) *citing to Adams,* 487 F.3d at 688.) Dismissal of a duplicative lawsuit promotes judicial economy, protects the parties from vexatious and expensive litigation, and serves the societal interest in bringing disputes to an end. (*Ricchio*, 2010 WL 1838317 at *4.)

Here, the donning and doffing claims asserted in the *Vallerand* and *Lockhart* lawsuits are identical because they arise from the same nucleus of facts. (*Mauro*, 2009 WL 1905036 at *4 (holding the inquiry that the Ninth Circuit applies in making such a determination is whether the two actions share a common transactional nucleus of facts).) As discussed at length above, both cases involve Plaintiffs who are deputy sheriffs[8] that wear the same types of LASD uniforms and are subject to the same LASD uniform policies. (UF Nos. 8, 9.) Further, it is unlikely Plaintiffs will present any new evidence or legal theories regarding their

[8] In *Mauro v. Federal Express*, although the actual parties in the first case *Brown v. Federal Express* were different from the actual parties in *Mauro*, the Court still concluded that both *Brown* and *Mauro* involved the same parties because both cases involved employees who were Couriers. Therefore, the Court looked at the class of plaintiffs and not the actual class representatives for purposes of determining whether *Mauro* was duplicative of *Brown*.

donning and doffing claim that were not already raised in *Vallerand*. Accordingly, the Court should exercise its broad discretion and dismiss Plaintiffs' donning and doffing claim from this case.

V. THE COUNTY IS ENTITLED TO PARTIAL SUMMARY JUDGMENT ON THE 7(K) AFFIRMATIVE DEFENSE UNDER THE COLLATERAL ESTOPPEL DOCTRINE

A. THE 7(K) ISSUE IN *LOCKHART* IS IDENTICAL TO THE 7(K) ISSUE PREVIOUSLY LITIGATED AND NECESSARILY DECIDED IN *VALLERAND*

The 7(k) affirmative defenses raised in *Lockhart* and *Vallerand* are identical if (1) there is substantial overlap in the evidence or argument presented in *Vallerand* and that to be advanced in *Lockhart*; (2) the same rule of law applies; (3) the pretrial preparation and discovery for *Vallerand* covered the information to be presented in *Ascolese*; and (4) the claims are related. (*Hydranautics,* 204 F.3d at 885; *RE/MAX,* 2007 WL 1110590 at *2.) An examination of these factors shows that the 7(k) affirmative defense raised in *Lockhart* and *Vallerand* are identical.

1. The 7(k) Affirmative Defense in *Vallerand* and *Lockhart* Are Related, Share the Same Discovery, and Share the Same Evidence and Argument

As its second affirmative defense in *Vallerand*, the County contended that the *Vallerand* plaintiffs are partially exempt from the overtime requirements of the FLSA because it has a 7-day, 7(k) exemption for its law enforcement employees including deputy sheriffs. (*See* 29 U.S.C. § 207(k); 29 C.F.R. § 553.230.) On November 8, 2010, the *Vallerand* Court found that the County established a regularly recurring seven day work period for its law enforcement employees, and as such, plaintiffs may not recover for unpaid overtime unless and until they prove they worked at least 43 hours in a seven day work period. (*See Vallerand* Dkt. #172 attached as Exhibit "2" to the RJN at p. 13:3-7.)

This very same affirmative defense is also being asserted by the County in *Lockhart*. (*Ascolese* Dkt. #29, pp. 9-10.) Because the *Vallerand* Court concluded that the County does, in fact, have a 7(k) exemption for its law enforcement

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employees, it stands to reason that the Plaintiffs in this case, who are also law enforcement employees, are also subject to the partial exemption. Accordingly, the 7(k) affirmative defenses asserted in both *Lockhart* and *Vallerand* are related to each other.

Because a determination on the applicability of the 7(k) exemption rests on the County's ability to show that it established a 7-day work period and that it was regularly recurring, the discovery and pretrial preparation conducted on this issue in *Vallerand* encompassed all of the 7(k) issues to be presented in *Lockhart*. A review of the undisputed evidence and arguments presented by the parties in their trial briefs regarding this issue confirms that the discovery and pretrial preparation had in *Vallerand* sufficiently covered the 7(k) issues to be presented in this case.

For example, the undisputed evidence contained in the trial briefs established that the *Vallerand* plaintiffs work a recurring 7-consecutive day work period. (*Vallerand* Dkt. # 172 attached as Exhibit "2" to the RJN at p. 13:3-7.) This evidence included the applicable MOUs, the *Vallerand* plaintiffs' payroll records, the County Code and a County document entitled "Work Patterns and Schedules." (*Vallerand* Dkt. # 172 attached as Exhibit "2" to the RJN at pp. 8:22-12:22.)

Despite the undisputed evidence of a recurring 7-day work period, the *Vallerand* plaintiffs argued that the County does not have a 7(k) partial exception because there is no evidence that the County declared, either publicly or formally, its intention to adopt a 7(k) work period. (*Vallerand* Dkt. # 172 attached as Exhibit "2" to the RJN at p. 6:5-13.) In support of this argument, the *Vallerand* plaintiffs attached declarations from their union representatives stating that the County's never declared adoption of a 7(k) work period. (*Vallerand* Dkt # 166-169.) The *Vallerand* plaintiffs also argued that the County did not adopt a 7(k) exemption because the MOU pays deputies overtime for all hours worked above 40 hours per week. (*Vallerand* Dkt. # 172 attached as Exhibit "2" to the RJN at p. 9:24-26.) However, based on the holding in *Adair* and the line of cases relied upon by the

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Ninth Circuit in that decision, the *Vallerand* Court rejected Plaintiffs' arguments. (*Vallerand* Dkt. # 172 attached as Exhibit "2" to the RJN at pp. 8:22-12:22.)

In this case, the County intends to present the same evidence presented in *Vallerand* to support its 7(k) affirmative defense with the exception of the *Vallerand* plaintiffs' payroll records. Instead, the County will present copies of the *Lockhart* plaintiffs' payroll records to demonstrate they work a recurring seven consecutive day work period. When Plaintiffs were asked to produce documents that support their argument that the County did not adopt a 7(k) exemption, Plaintiffs stated that they have no documents. (UF No. 12.) Thus, the County believes that no additional evidence will be presented by the Plaintiffs on the 7(k) issue.

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2. The Same Rule of Law Applied in *Vallerand* Regarding 7(k) Will Also Apply to *Lockhart*

The issue confronted by the *Vallerand* Court was whether the County had a 7(k) partial overtime exemption for its law enforcement employees, including deputy sheriffs. In order for the exemption to apply, the County had the burden of showing that it established a 7(k) work period and that the 7(k) work period was regularly recurring. This test was derived from the Ninth Circuit's holding in *Adair v. City of Kirkland*, 185 F.3d 1055, 1060 (9th Cir. 1999), which is the controlling law of this Circuit regarding applicability of the 7(k) exemption. Consequently, *Adair* will also control the outcome of the County's 7(k) affirmative defense in this case as it did in *Vallerand*.

B. THE *VALLERAND* COURT'S ADJUDICATION OF THE 7(K) ISSUE IS A FINAL JUDGMENT FOR COLLATERAL ESTOPPEL PURPOSES

As discussed above, a "final judgment" for purposes of collateral estoppel can be any prior adjudication of an issue in another action that is determined to be "sufficiently firm." (*Luben*, 707 F.2d at 1040.) Among the factors considered in determining whether a prior adjudication is "sufficiently firm" are whether the

decision was not avowedly tentative, whether the parties were fully heard, and whether the court supported its decision with a reasoned opinion. (*Id.*)

The *Vallerand* Court's adjudication of the 7(k) affirmative defense satisfies all of these factors. First, the Court's decision is not tentative. Rather, the ruling represents the Court's final decision on Phase I of the trial in *Vallerand*. Further, the *Vallerand* plaintiffs were given an ample opportunity to be heard on the 7(k) issue through the submission of extensive trial briefs and supporting evidence. Finally, the decision is supported by a 13-page written opinion detailing the Court's rationale for finding that the County has a 7-day, 7(k) partial overtime exemption for its deputy sheriffs. Consequently, the *Vallerand* Court's decision on the 7(k) affirmative defense is final for purposes of collateral estoppel.

C. PRIVITY EXISTS BETWEEN THE *LOCKHART* AND *VALLERAND* PLAINTIFFS

As discussed in Section IV.D, *supra*, the plaintiffs in both cases are in privity with one another because they are all employees of the LASD subject to the same Manual of Policies and Procedures, MOU, County Code and timekeeping policies and procedures that formed the basis of the *Vallerand* Court's 7(k) ruling. (*See Mauro*, 2009 WL 1905036 *3; *LAPPL I*, 94 Cal.App.4th at 84; *LAPPL II*, 102 Cal.App.4th at 91.) As such, the privity requirement is clearly satisfied here.

D. THE EQUITIES OF THIS CASE WEIGH IN FAVOR OF GRANTING PARTIAL SUMMARY JUDGMENT ON THE COUNTY'S 7(K) AFFIRMATIVE DEFENSE

Even if the Court concludes that the factors for defensive use of collateral estoppel have not been met, the Court may still grant the County partial summary judgment on its second affirmative defense regarding the 7(k) exemption pursuant to its broad discretion to prevent duplicative or unnecessary litigation. (*Ricchio*, 2010 WL 1838317 at *4; *Mauro*, 2009 WL 1905036 at *4.) Because the 7(k) issue in both lawsuits arise from the same nucleus of facts, as discussed above, granting the County partial summary judgment on its second affirmative defense in this case

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is appropriate and would conserve judicial resources. (*Mauro*, 2009 WL 1905036 at *4.)

VI. CONCLUSION

For the foregoing reasons, the County respectfully requests that the Court grant the motion for partial summary judgment in its entirety.

Dated: November 18, 2010

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